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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable William H. Alsup, Judge

ORACLE AMERICA, INC.,)	
)	
Plaintiff,)	
)	NO. C 10-03561 WHA
vs.)	
)	
GOOGLE INC.,)	
)	
Defendant.)	
)	

San Francisco, California
Tuesday, February 2, 2016

TRANSCRIPT OF PROCEEDINGS

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1 Tuesday - February 2, 2016

10:58 a.m.

2 P R O C E E D I N G S

3 ---000---

4 **THE COURT:** Be seated.

5 **THE CLERK:** Okay. Calling Civil Action Number
6 10-3561, Oracle America versus Google. A hearing for a motion
7 to strike is now on. Counsel, can you please state your
8 appearances for the record?

9 **MS. HURST:** Good morning, Your Honor. Annette Hurst,
10 for Oracle.

11 **MS. ANDERSON:** Good morning, Your Honor.
12 Christa Anderson, Gene Paige, Matthias Kamber, on behalf of
13 Google.

14 **THE COURT:** Thank you. Welcome.

15 **MS. ANDERSON:** Thank you.

16 **THE COURT:** Google has a motion, so go ahead.

17 **MR. PAIGE:** Thank you, Your Honor. Good morning.
18 And thank you for seeing us on this motion.

19 Your Honor, this is a limited retrial of a case that was
20 already tried to verdict on some issues. And the cases that
21 Oracle cites in its brief are pleading cases relating to cases
22 that just started: Complaints, 12(b)(6) motions.

23 That's not what we have here. What we have here is a
24 remand from a trial in which there was a finding of copying,
25 although not a finding on fair use. So no finding of

1 infringement as of yet as to Java 1.4 and Java 5 SE. Those
2 were the -- those were the copyrighted works that were put into
3 the jury charge by the Court with Oracle's consent. Java SE 6
4 was actually introduced into evidence at the first trial. Both
5 the source code and the copyright registration were in
6 evidence, but they asked for a verdict on 1.4 and 5, and that's
7 what they got.

8 Now, when Oracle came here in July to discuss the shape of
9 the case on this retrial, they said to you, *We're going to try*
10 *fair use, we're going to try willfulness* -- we didn't agree
11 with that, but that was their position -- *and we're going to*
12 *try damages*; nothing about infringement of new works.

13 Now Oracle suggests now that it didn't know about
14 additional alleged infringement, but these works have been out
15 there for years. Again, Java 6 was in the first trial;
16 introduced into evidence. Java 7 came out in 2011, before the
17 first trial. The materials they claim are infringing were
18 coming out as early as 2010, 2011; again, before the first
19 trial. Oracle never said they'd discovered this new
20 infringement.

21 And when it then decided sometime in this case that it
22 discovered new infringement, it didn't come to the Court, it
23 didn't come to us and say, *It turns out we were wrong when we*
24 *said that no new works were identified in this Complaint* -- the
25 Supplemental Complaint. *We actually have new works, Java SE 6*

1 *and Java SE 7, that are infringed.*

2 Instead what they did was start putting in a pleading on
3 November the 9th, saying that they're going to have something
4 that involves later editions of the Java SE platform. And we
5 saw that. And we wrote to them right away and we said, you
6 know, *What are you talking about? This is not about Java 6.*
7 *This is not about Java 7. This is about later versions of*
8 *Android against the things that were found to have been copied*
9 *in the first trial: Java SE 1.4, and Java SE 5.*

10 And their response was just to say, *Well, you'll see it in*
11 *our expert reports.*

12 So, you know, this just came out in discovery; well
13 towards the end of discovery. And there was never any sort of
14 suggestion that we would have a second infringement trial here.

15 Oracle's just telling you now that, *Well, when we said*
16 *'copyrights' in the Supplemental Complaint, we meant to include*
17 *the copyrights on Java SE 6 and Java SE 7.*

18 Of course, that's not what they said at the time. They
19 said, *No new works are identified.*

20 And, of course, the language in the Amended Complaint in
21 October 2010 said "copyrights" in the Java platform --
22 plural -- because there are copyrights in the case. There's
23 copyrights for Java 1.4. There are copyrights for Java SE 5.

24 Now, this is a recipe for jury confusion. The jury's
25 going to be told that as to 1.4 and 5, they don't need to

1 consider issues of infringement. That's already been
2 determined by the first trial. Instead, they're going to focus
3 on questions of fair use.

4 But as to Java SE 6 and Java SE 7, if they were allowed in
5 the case at this point, the jury would then be told, *Well, you*
6 *have to determine whether those are infringed.* And the
7 infringement determination will require a comparison of the
8 works as a whole. And, as Oracle itself says, there have been
9 things added to both Java and to Android over time. So the
10 works as a whole are different than SE 5 -- SE 1.4 and SE 5.
11 And Google has a right to have the jury decide whether those
12 new works -- SE 6 and SE 7 -- are substantially similar to the
13 Android platform.

14 Now, the jury's going to be confused by this. The jury is
15 also going to perhaps draw an adverse inference against Google.
16 Google's going to be in the position of having to explain why
17 it is that something that looks much the same, that a first
18 jury has already decided on, should be given due consideration
19 that you're entitled to in the question of copyright
20 infringement.

21 And then as to discovery we also have issues because, as
22 Your Honor might recall, when they asserted infringement of the
23 Java platform the first time around, they started out with 51
24 APIs that were allegedly infringed. By the time we got to
25 trial, there were 37 of those APIs.

1 Why?

2 Because 14 of those APIs that are in the Java platform on
3 which they allegedly hold copyrights are APIs that Oracle does
4 not own; are APIs enforceable only by other entities, other
5 people. So those 14 dropped out. We don't know how many of
6 these new ones in Java SE 6 and Java SE 7 that were just
7 revealed in the expert reports on January 8th may, in fact, be
8 owned or enforceable by someone else only.

9 Now Oracle claims that Java SE 6 and 7 is relevant to fair
10 use, but it cites no cases suggesting that fair use is about a
11 work other than the infringed work. And the infringed work at
12 this point is Java SE 5 -- 1.4 and SE 5; not 6 and 7.

13 Oracle claims that 6 and 7 are relevant to willfulness;
14 but as Your Honor knows, willfulness is something that's only
15 going to come in, if at all, in the second phase of the trial.
16 It's not something that we need to have in the first phase of
17 the trial at all.

18 Oracle claims that Java SE 6 and 7 are relevant to
19 equitable defenses, saying that because we didn't stop using
20 this right away after suit, somehow equitable defenses are
21 barred. Well, we're still using whatever is in 1.4 and 5, as
22 well. So that's no different for SE 6 and 7 than it is for 1.4
23 and 5.

24 And it can't explain why SE 6 and 7 would matter to the
25 trial of the case, in terms of remedies. There's nothing in

1 their damages theory that suggests that 6 and 7 are somehow
2 different. What they're saying is that the use of the 37 APIs
3 way back when is what caused them damage; not any particular
4 difference with respect to 6 and 7. That's nothing in the
5 damages theory, so it's not a remedies question, either.

6 Unless the Court has any more questions -- or has any
7 questions, that's --

8 **THE COURT:** Not yet.

9 Let's hear from the other side.

10 **MR. PAIGE:** Thank you, Your Honor.

11 **MS. HURST:** Good morning, Your Honor.

12 To be clear, what's been included in Oracle's expert
13 reports are only new infringement since the time of the last
14 verdict of Java 6 and 7. So it's not in any way seeking to go
15 behind the earlier verdict to assert --

16 **THE COURT:** But there's never been any jury finding
17 that 6 and 7 were infringed.

18 **MS. HURST:** Certainly, Your Honor. And the
19 Supplemental Complaint pleads an infringement claim.

20 **THE COURT:** Yeah, but you said that there were not
21 going to be any new works.

22 **MS. HURST:** Your Honor --

23 **THE COURT:** Now you're -- wait.

24 **MS. HURST:** I apologize.

25 **THE COURT:** Please don't interrupt the Judge. Have

1 some respect.

2 **MS. HURST:** I apologize, Your Honor.

3 **THE COURT:** You told me there would be no new works.
4 That turns out to be untrue. Now you have you want to have an
5 infringement trial where we ask the jury to decide whether 6
6 and 7 have been infringed. That's only way to get to where you
7 want to be. True?

8 **MS. HURST:** Your Honor, when I was here on July 30th,
9 Oracle had no idea that Google had added new material from
10 Java 6 and 7 in the later versions of Android. We had no idea,
11 Your Honor.

12 **THE COURT:** Well, maybe we have a --

13 You know, I mean, let me --

14 There's a much cleaner way to deal with this. We can roll
15 back the clock to the moment that that trial took place, and
16 try it on that set of facts and the circumstances then. And
17 then all these new products by you and these new products by
18 Google would not be in play.

19 And what that means is, over there on the Google side,
20 that you're going to have to face another lawsuit downstream,
21 because it would not be fair for Google to say, *Oh, you can put*
22 *in* --

23 What are the names of -- all those ridiculous names?
24 Winterhaven or something. I don't remember, but they all have
25 a --

1 You can't put those in play, your own products in play --
2 that's what you want to do -- and then limit them to just the
3 two: That 1.4 and 5.0. That's what you want to get away with
4 on your side, so that they don't get to use 6 and 7 anymore,
5 but we can just subtract them out of the case, too.

6 And we'll find out what should have happened on the
7 original trial, with the way the Federal Circuit say it should
8 have come down. And then we'll have a -- there will still be a
9 huge trial, but we'll have a somewhat simpler thing, rather
10 than the God-awful multiplication of issues that Ms. Hurst
11 wants to foist onto the jury.

12 That's where I'm headed, is that we're going to roll back
13 the clock, and we're not going to do any of this new stuff.
14 We're going to go back to Day One.

15 So I'm going to give you both a chance to talk me out of
16 this. Go ahead.

17 **MS. HURST:** Your Honor, the --

18 **THE COURT:** I think I was had. I think I was misled
19 on the --

20 You may not have known, but you should have known. And if
21 you didn't know, you shouldn't have made that representation to
22 me. And then you tried to sneak it by them; sneak it by me,
23 too. That's the way it looks.

24 **MS. HURST:** Your Honor, I absolutely want to assure
25 the Court a thousand percent that that is not what happened.

1 **THE COURT:** Why don't you stand by what you told me,
2 and say, *Okay, Judge. I made a mistake. I told you that 6 and*
3 *7 were not going to be in the case, and now I want to put them*
4 *in the case; but since I have misrepresented something to you,*
5 *Judge, I'm going to take it back. We don't want that in the*
6 *case after all. That's the honorable thing to do. That's what*
7 you should be doing.

8 **MS. HURST:** Your Honor, at the time we came here in
9 July, Oracle had no idea.

10 **THE COURT:** You said that a while ago.

11 **MS. HURST:** I just want to assure you.

12 **THE COURT:** You should have known. These products
13 are out there on the market. You could have reverse
14 engineered, and figured it out.

15 **MS. HURST:** Your Honor, may I have a moment to
16 consult with Oracle regarding the Court's inquiry?

17 **THE COURT:** You may have about five minutes.

18 But I want to say something to Google. I know what you're
19 trying to get away with. What are the names? Come up here and
20 tell me what the names of all of those follow-on products are
21 that they always -- like Popsicle, and things. What are those
22 names?

23 **MR. PAIGE:** The new ones, Your Honor, are
24 Gingerbread, Ice Cream Sandwich, Jelly Bean, KitKat, Lollipop,
25 and Marshmallow.

1 **THE COURT:** All right. So if we go down this path,
2 you're going to have to litigate all of that later. You're not
3 going to get away with just having them -- the 1.4, and you
4 roll that into just those two. See, that's what you want to
5 do. You're perfectly happy to have the subsequent Google
6 products go to trial, because you want to get immunized from 6
7 and 7.

8 **MR. PAIGE:** Well, Your Honor, I mean the Supplemental
9 Complaint was filed by Oracle seeking to bring those new
10 products into the case for, presumably, damages purposes. They
11 didn't want to say that, you know, a new phone's being sold --

12 **THE COURT:** Here's the other thing. If I go down
13 that path and you lose, I am going to enjoin all of those other
14 products, anyway, because I'm going to assume -- me, as the
15 equitable Judge. I don't have -- I can say, *Look. You don't*
16 *get the right to --*

17 If they find infringement back on Day One, way back
18 then -- the jury -- then I'm going to put the burden on you to
19 show that those follow-on products are somehow so dramatically
20 different, that they should not be enjoined.

21 Now that's assuming that the product -- the requirements
22 for an injunction would be met: Public interest, and all of
23 that. I would have to go through that process, but I would not
24 want you to think for a moment that if we take those
25 Gingerbread plus out, that you're going to be immunized on an

1 injunction from those products. That would not be necessarily
2 the way it would come down.

3 But my basic view here is: You two have multiplied this
4 case. It's going to be so hard for a jury to understand, to
5 begin with. And now you want to start rolling in brand-new
6 infringement, brand-new -- putting all these additional things
7 in, making it so complicated.

8 I think we out to just go back to Day One. And then the
9 day will eventually come where Ms. Hurst gets to try the case
10 all over again. She might win on this one. She might lose on
11 this one.

12 Let's say that it turns out that the jury goes for fair
13 use. Will that somehow be *res judicata*? I don't know. Maybe
14 you have to go through the gauntlet twice over there on the
15 Google side. I'm not going to decide that now.

16 **MR. PAIGE:** Understood, Your Honor. And --

17 **THE COURT:** Your partner here wants to --

18 **MS. ANDERSON:** May I?

19 **THE COURT:** -- tell you that maybe you're in trouble.
20 What would you like to say?

21 **MS. ANDERSON:** No, not at all. Mr. Paige is not in
22 trouble, at all.

23 I just wanted to add a point, Your Honor, for Your Honor's
24 consideration. I think that Google has tried really hard
25 throughout the management of this retrial to try to make things

1 work smoothly in the limited amount of time we had available.

2 And a big difference between the addition of these new
3 versions of Android and the attempt by Oracle to add in new
4 copyrighted works at the last minute is that from the inception
5 we have been willing to and have offered to stipulate that the
6 same aspects of those 37 Java APIs that were found to be used
7 in the first trial continue to be used in the newer version, so
8 it would not interrupt the trial of the case, so it would not
9 be confusing, so it would be smooth and understandable. And
10 that is how we were able to manage, we thought, this very short
11 time frame.

12 **THE COURT:** That's a generous step forward. Okay.
13 So then you would be stuck with that.

14 But are you trying to say, then, that --

15 Let's say that you somehow won -- okay? -- at trial. And
16 then they want to sue you on 7.0 for the very same products.
17 Would you then say, *Oh, no. You can't do that. That's -- you*
18 *had your chance, and you blew it?*

19 **MS. ANDERSON:** Well, Your Honor, if -- if Oracle is
20 not allowed in this retrial to add in new copyrighted works,
21 which we believe they should not be allowed to -- and we're not
22 talking about Java 6, which we believe there is a clear waiver
23 on.

24 **THE COURT:** Let's just stick with 7.

25 **MS. ANDERSON:** Just talk about 7. I mean, if Oracle

1 has the grounds to file a suit and they elect to do so, it
2 would happen in another case. And that other case would have
3 its own considerations. And if they asserted against the newer
4 versions --

5 **THE COURT:** But are you going to somehow think: *Oh,*
6 *well, we don't -- it's res judicata. They should have asserted*
7 *that in the old case. And they now can't go back and try two*
8 *bites at the apple?*

9 **MS. ANDERSON:** I don't think it would be reasonable
10 if we were here telling Your Honor that they should not be
11 allowed to try Java 7 in this case; that we could then turn
12 around and say, you know, they're absolutely barred from
13 asserting Java 7.

14 That said, I don't know what the verdict will be in this
15 case. And if there is an issue that somehow creates some kind
16 of estoppel effect in another litigation based on a result that
17 hasn't happened yet that we don't know, I certainly don't think
18 Google is foreclosed from raising that; but clearly we are
19 saying to Your Honor it's not fair at the last minute at the
20 end of discovery to go back on Oracle's word and say, *When we*
21 *said we weren't putting in new works, we really are, and we*
22 *want to make this trial a hodgepodge between something that had*
23 *been tried before, and something that hasn't been.*

24 **THE COURT:** All right. So let me make sure that I'll
25 modify -- I don't know if I should even modify this.

1 My initial inclination is not to put Gingerbread and all
2 of that into it at all, because that is not where we were with
3 the old jury. I want to go back to the day and the moment that
4 the jury returned a verdict and pick it up the way it would
5 have gone down based on what the Federal Circuit decided that
6 would have been back then, with none of this new information.

7 To me that's the straightforward, even though complicated,
8 way to go.

9 Now, what I've -- the way I read your pleading was that
10 you're willing to roll in, for damages purposes, these five
11 subsequent products on the Google side, and litigate those as
12 to 1.4 and 5.0, but leave yourself open to a subsequent case
13 for 7.0.

14 **MS. ANDERSON:** If Oracle believes that they have the
15 right to file that suit, then we realize that by taking this
16 position before Your Honor, that that is a possibility; but the
17 point is that there are -- there are defenses to copyright
18 infringement that have never been tried, and analyses of
19 whether or not there is a use that would constitute and fall
20 within copyright infringement that never happened in Trial One.

21 **THE COURT:** I'm sorry. Wait. I didn't follow what
22 you said.

23 **MS. ANDERSON:** Sure.

24 **THE COURT:** Perfectly fine. I just was back on a
25 prior sentence. Say that last sentence again. There were some

1 things --

2 **MS. ANDERSON:** Right. I apologize.

3 **THE COURT:** There was something in the trial that --
4 Go ahead.

5 **MS. ANDERSON:** Sure. I apologize. I won't do it
6 perfectly, but the last trial, Your Honor, there was a jury
7 verdict; a finding of use of the copyrighted works that the
8 jury felt constituted infringement. And they checked that box
9 on two copyrighted works. They made an analysis under Your
10 Honor's instructions that they felt it satisfied that standard.

11 That has never happened with respect to Java 7.

12 **THE COURT:** I agree with that point. Where does that
13 get you?

14 **MS. ANDERSON:** Well, the difference that we're trying
15 to present to the Court here is that it's one thing when Oracle
16 said up front, *We're adding the new versions of Android*, and we
17 said up front, *Fine*. You know, we'll stipulate that they are
18 using the same method headers that were tried in the first
19 case, so that becomes a nonissue for trial. It's the same. It
20 smoothly resolves these issues in one fell swoop.

21 But we realize that if Java 7 is excluded from this case
22 for an infringement-analysis purpose, then we -- obviously, if
23 Oracle has bases to sue on the other one, we'll obviously have
24 to deal with that at a later point. But it's unfair to
25 prejudice the defendant from ever having a chance to have that

1 jury-verdict analysis on Java 7 in a way that wouldn't
2 prejudice Google, by having presented to the jury a hodgepodge
3 case, part of which is a retrial, part of which is supposedly a
4 new trial, which clearly would be influenced by the resolution
5 of the first trial. And they would have instructions in that
6 regard. And it would create a very difficult trial, from our
7 perspective, from the perspective of fairness.

8 **THE COURT:** All right. You wanted to go and talk to
9 your client for a moment, so why don't you do that? Both sides
10 can do that if they want.

11 **MS. HURST:** Thank you, Your Honor.

12 **MS. ANDERSON:** Thank you, Your Honor.

13 **THE COURT:** I'll just sit right here and wait.

14 (Pause in proceedings.)

15 **THE COURT:** All right. You want to resume? What
16 would you like to say?

17 **MS. HURST:** Thank you, Your Honor.

18 I would -- Oracle is willing to reserve its new claims for
19 infringement of 6 and 7.

20 I would like an opportunity to explain to the Court that
21 we did not in any way intend to mislead the court when we were
22 here in July. Your Honor, we absolutely did not know that
23 there had been expanded infringement of 6 and 7. We did
24 actually try to reach a stipulation. That was the first thing
25 that Oracle did. We sent a proposed stipulation. And

1 unfortunately, Google -- it took them about a month to consider
2 it. And in the meantime, we decided we had to go forward with
3 the code comparison. And it was not until we undertook that
4 entirely new and complete code comparison in September and
5 October that Oracle learned of this.

6 We also thought we would proceed by stipulation,
7 Your Honor. The problem was both that it took a long time for
8 them to respond, and that when they got back to us, the answer
9 was to limit the case in a way that we felt was unwarranted by
10 the Federal Circuit's decision.

11 So, Your Honor, it wasn't until we uncovered the evidence
12 in October really that we understood about this. And then we
13 immediately answered in interrogatories that that was present,
14 but we did not give the total line-by-line comparisons until
15 the time of expert reports. That was when we made a complete
16 disclosure. We made a disclosure to them as soon as we knew
17 about this in discovery -- in fact discovery -- and then gave
18 them a complete disclosure in the expert reports on
19 January 8th.

20 So, Your Honor, I just want to assure the Court that this
21 was not something that Oracle knew when we came here in July.

22 We do think it would be important, Your Honor, for the
23 case to continue with Gingerbread through Marshmallow, as was
24 originally contemplated by the Supplemental Complaint; and that
25 that would be the fair and appropriate way to proceed with

1 respect to fair use and the other issues, Your Honor, resulting
2 in less duplication and confusion; but Oracle is willing to
3 reserve 6 and 7 if that is the Court's Order.

4 **THE COURT:** Well, 6 there's an issue on, because it
5 was introduced at trial on there; but 7 I don't -- seems to me
6 you should be allowed to reserve on 7, because you can't be
7 denied your day in court on 7. And maybe even on 6 you could
8 resurrect that one. I don't know. That's a different slightly
9 different issue. So all right. That's where I'm tentatively
10 headed.

11 Anything on your side you want to say?

12 **MS. ANDERSON:** No, Your Honor. I would just say that
13 I do hope parties can work to resolve that stip., because we
14 think it is important and helpful. We did send our draft in
15 October, so we're ready to do it; to get the newer versions
16 cleaned up.

17 **THE COURT:** All right. Now I want to go to another
18 thing. I -- that you all are bombarding me with. I don't
19 intend to entertain summary-judgment motions and dispositive
20 motions. Whose idea was that?

21 We had the Federal Circuit order me to give you a trial.
22 I'm going to give the trial. And if the evidence shows that
23 Rule 50 should be granted at the end of the trial, okay. I can
24 do that on the evidence at trial.

25 But you're trying to bombard me with a bunch of a

1 summary-judgment motions ahead of time. This is not the way
2 we're going to do it.

3 The mistake got made because I was led into error at
4 trial. So we're going to go right back to where we were, and
5 we're going to resume there. But we're not going to go into a
6 bunch of summary-judgment motions.

7 Now, who was it that wanted the summary-judgment motions?

8 **MS. HURST:** Your Honor, it was us. We wanted to get
9 the equitable estoppel and laches issues resolved, if possible.

10 **THE COURT:** You think I can do that on summary
11 judgment?

12 **MS. HURST:** Yes, Your Honor, because based on the
13 findings by the prior jury and the Court's prior findings, and
14 the fact that no new evidence in support of those defenses
15 arose during this most recent fact discovery period, we thought
16 it would be appropriate for the Court to dispose of it before
17 trial.

18 **THE COURT:** Well, I let that go to the jury before;
19 didn't I?

20 **MS. HURST:** No, Your Honor. There was an advisory
21 verdict. It is for the Court. And the advisory verdict was
22 against --

23 **THE COURT:** Well, why can't I just let the jury hear
24 all of that? What's wrong with that?

25 **MS. HURST:** Well, Your Honor, there would be a

1 Seventh Amendment issue in allowing a second jury to reexamine
2 those defenses, particularly when there's no new evidence that
3 would entitle Google to relief. In a --

4 **THE COURT:** Let me understand. What's the harm in
5 letting the jury hear it? The jury's going to hear it. The
6 Seventh Amendment is satisfied if the jury decides the issues
7 that are jury issues. And if this is an issue for me to
8 decide, I could decide that.

9 **MS. HURST:** Well, Your Honor, it injects the issue of
10 this quasi-license defense, which is confusing and prejudicial
11 to Oracle. There is no license. And the prior jury found that
12 there was no reliance that would satisfy.

13 And it's also confusing -- prejudicial to Oracle --
14 because the Supreme Court, in the meantime, has adopted a
15 standard for laches which makes absolutely clear that laches
16 could not possibly obtain here. So for the jury to hear
17 evidence on defenses that, by definition, Google is not
18 entitled to is prejudicial -- unduly prejudicial to Oracle.

19 And it's also the undue consumption of time, Your Honor.
20 We have only two weeks for this trial. There's an undue
21 consumption of time. And you have evidence coming in under a
22 relevance standard, Your Honor, that should not otherwise be
23 available to Google.

24 **THE COURT:** All right. What do you have to say?

25 **MS. ANDERSON:** Oh, I was just going to add,

1 Your Honor, that -- that almost exclusively the evidence that
2 Your Honor will be hearing relates to these equitable defenses
3 that Your Honor will decide are going to be introduced, we
4 believe, as part of the fair-use trial in any event. It's not
5 going to be a loss of time.

6 **THE COURT:** Has somebody listed what these items in
7 dispute are, or is this just another one of these big-firm,
8 abstract, hypothetical exercises where, when you really get
9 down to it, there's only one or two items in dispute?

10 I mean, this -- it's so hard on the poor Judge to try to
11 figure this out. Give me the actual document number or witness
12 testimony that's going to be -- that's in dispute between the
13 two of you.

14 **MS. ANDERSON:** Well, for the equitable defenses in
15 their entirety?

16 **THE COURT:** Yeah. Give me an item that you think --

17 Well, let me put the burden on Ms. Hurst. Give me an item
18 of evidence that you think they're going to want to put into
19 evidence that you think should not be heard by the jury.

20 **MS. HURST:** Yes. I would say --

21 **THE COURT:** A real item of evidence.

22 **MS. HURST:** -- two things, Your Honor, at a minimum.

23 First --

24 **THE COURT:** Okay.

25 **MS. HURST:** -- the Schwartz blog, which the Court

1 carefully considered and almost excluded the last time around.

2 Second, all of the stuff about Apache Harmony.

3 Your Honor.

4 **THE COURT:** What?

5 **MS. HURST:** Apache Harmony, the nonprofit foundation
6 that, you know, tried to do a Java implementation.

7 All of that stuff is related to their equitable defenses.

8 And we believe the relevant and prejudice standard for
9 fair use would be very different on those items.

10 **THE COURT:** All right. So what's the name of that
11 guy? Schwartz?

12 **MS. HURST:** Schwartz.

13 **THE COURT:** All right. What do you see to the
14 Schwartz blog?

15 **MS. ANDERSON:** Well, Your Honor, working just from
16 memory here, but the Schwartz blog is an official statement of
17 Sun. In fact, they announced it publicly. Your Honor made the
18 right decision in letting it in the first time. It should come
19 in this time. It's relevant to various --

20 **THE COURT:** Did you prove that I almost didn't let it
21 in? I don't remember that anymore.

22 **MS. ANDERSON:** Yes, Your Honor. His statements --

23 **THE COURT:** So I almost didn't let it in?

24 **MS. ANDERSON:** I don't remember whether there was --
25 I don't remember off the top of my head if there was a debate,

1 but I do remember there was ample testimony about Mr. Schwartz
2 and his statements on his official blog.

3 **THE COURT:** Well, I remember the testimony. Yes, I
4 do.

5 But Ms. Hurst said that I almost excluded it.

6 **MS. ANDERSON:** I don't recall that, Your Honor, off
7 the top of my head. I'd have to check.

8 **THE COURT:** I don't remember it well enough to tell
9 you whether I did or not. All right. I do remember the
10 evidence, and it was something to the effect of how great
11 Android was.

12 **MS. ANDERSON:** Exactly. Welcoming, applauding it.

13 **THE COURT:** Why shouldn't be that be part of the
14 fair-use consideration?

15 **MS. HURST:** It has no relevance to any of the four
16 factors of fair use, Your Honor.

17 **THE COURT:** Which factor does it relate to?

18 **MS. ANDERSON:** It's relevant to the core of the test:
19 Is it reasonable under the circumstances?

20 It certainly was. Not only was it reasonable in the way
21 that APIs are used in this industry; but Sun, itself,
22 immediately upon its release said, *It's not just reasonable.*
23 *It's great. Thank you for releasing this.*

24 **THE COURT:** Well, which of the four factors does it
25 tie into?

1 **MS. ANDERSON:** Well, the nature and --

2 I don't have a four in front of me.

3 The nature and character of the use, first off. I mean,
4 we have a history here.

5 Oh, thank you for the factors here.

6 Purpose and character of the use -- my apologies -- is the
7 first one.

8 And remember that the core of the test here is: Is it
9 reasonable under the circumstances? That is the core of the
10 test.

11 **THE COURT:** Did the Court of Appeal -- did the
12 Federal Circuit rule that it agreed with Mr. Hurst, and say
13 *That should not come into evidence?*

14 **MS. ANDERSON:** Not ruled upon by the Federal Circuit,
15 Your Honor. I have no -- in fact, it wasn't an issue appealed
16 by Oracle. And this is a matter where --

17 **THE COURT:** The fair use was appealed?

18 **MS. ANDERSON:** Right, but in terms of evidentiary --

19 **THE COURT:** They set out what the standard was.

20 **MS. ANDERSON:** Indeed, Your Honor, in terms of
21 challenging your -- I don't recall. I would be happy to double
22 check. I don't recall anything in the Federal Circuit opinion
23 reflecting the fact that Oracle challenged Your Honor's
24 evidentiary ruling concerning Mr. Schwartz's testimony or
25 statements. I don't remember that being a subject. I would be

1 happy to double check that for the Court, though.

2 But the bottom line here is both things -- Mr. Schwartz's
3 statements, including on his blog, which was the official
4 corporate statement of Sun, applauding Android. For years he
5 did this. And --

6 **THE COURT:** So why doesn't that show transformative?
7 Isn't that one of the factors?

8 **MS. ANDERSON:** Absolutely. It's part of that, as
9 well, Your Honor.

10 **THE COURT:** From that, couldn't the jury say that
11 somebody important at Sun, speaking on behalf of Sun, said
12 words that were close to saying it was transformative? Why
13 isn't that -- why isn't that relevant?

14 **MS. HURST:** Your Honor, that is directly within the
15 scope of where the Federal Circuit did carve back on Google's
16 case. If there was one thing the Federal Circuit said about
17 fair use, it said that Google overreached in its claims that
18 there were transformativity, or whatever is the right word
19 here, and compatibility. And, Your Honor, it would not be
20 appropriate, in light of the Federal Circuit's ruling, to take
21 a blog as some kind of evidence of transformation, which, in
22 any event, would be objective.

23 **THE COURT:** It's a blog by your client. You're -- by
24 Sun at the time. Right?

25 **MS. HURST:** Your Honor, it is. And -- but the

1 content of that does not show transformation, especially when
2 one considers the timing of the blog post, which was just after
3 the announcement of the platform, and long before it had been
4 completed, implemented in products, and the market effects were
5 known.

6 **THE COURT:** All right. What's your answer on the
7 Apache thing, Ms. Anderson?

8 **MS. ANDERSON:** Yes, Your Honor. The other item of
9 evidence that Oracle cites is the Apache Harmony. And the
10 reason that Oracle cites this is because -- and the reason that
11 Google has pointed to this in evidence, last trial, among other
12 things, is this is evidence of commercial use; that, you know,
13 one of Oracle's arguments here is that what Google did wasn't
14 fair and wasn't a fair use, because it was a commercial use of
15 admittedly free method headers that Oracle/Sun distributed for
16 free under OpenJDK. And they've argued that what Google did
17 wasn't fair use because it was commercial.

18 And we say no. In fact, Sun/Oracle applauded the
19 commercial uses by a host of organizations, which will be cited
20 in evidence -- and they are part of our expert reports in this
21 case -- that include Apache Harmony. And so that was one of
22 the pieces --

23 **THE COURT:** How do you get around --

24 Ms. Hurst says that the Federal Circuit took Google to
25 task on fair use for having overreached.

1 **MS. ANDERSON:** Well, actually, I'm looking at the
2 Federal Circuit opinion here. And --

3 **THE COURT:** I got it right here.

4 **MS. ANDERSON:** Yeah. Just --

5 **THE COURT:** What page should I look at?

6 **MS. ANDERSON:** Well, just at the very beginning. I'm
7 looking at -- my thing says -- it looks like it's page 17.
8 Hold on. Ah. Star 7. Let's see. Right before. Right before
9 the full copyrightability discussion, where the Court's kind of
10 summarizing its opinion.

11 **THE COURT:** What -- what -- all right.

12 **MS. ANDERSON:** And I can't really tell from my copy
13 here what is the official page, but in the book that I believe
14 this came from, it was page 17.

15 **THE COURT:** Well, help me find the part, Ms. Hurst --
16 I got the opinion right here -- where Google got taken to task.
17 I want to read that right now.

18 **MS. HURST:** One moment, Your Honor.

19 **THE COURT:** Okay. So I'm at page 1,374. So just
20 tell me the paragraph you think that's most on point. I'll
21 read it out loud.

22 **MS. ANDERSON:** Your Honor, because my pagination --
23 I'm under the section entitled "B. Fair Use." Is that
24 approximately where Your Honor's pointing to?

25 **THE COURT:** Yeah. That's where I am.

1 **MS. ANDERSON:** Thank you.

2 **THE COURT:** I'm looking for the paragraph that
3 Ms. Hurst says took Google to task. And maybe there is one,
4 but let's focus on that paragraph. And then I'll have some
5 follow-up questions.

6 **MS. HURST:** Your Honor, I'm looking at page 60 of the
7 slip opinion, which is well into the fair-use discussion.

8 There's a paragraph at the end of the Court's setting out
9 of the legal standard that begins with the phrase, "On balance,
10 we find that due respect for the limit of our appellate
11 functions requires that we remand the fair-use question for a
12 new trial."

13 Later in that paragraph, Your Honor, the Court says,
14 "While Google overstates what activities can be deemed
15 transformative, under a correct application of the law, we
16 cannot say there are no material facts in dispute on question
17 of whether Google's use is transformative under a correct
18 reading of the law."

19 **THE COURT:** Okay.

20 **MS. HURST:** That was the overreaching, or actually,
21 to use the precise words of the Federal Circuit,
22 "overstatement" that I was referring to.

23 **THE COURT:** All right. So now can we divine what
24 they had in mind -- what the overstatement was -- by going back
25 and looking at the briefs?

1 I mean, in other words, if Apache was --

2 I don't know. I mean, how do I know that they meant
3 Apache here? Were you all at the oral argument? Maybe it came
4 up at the oral argument.

5 **MS. ANDERSON:** Your Honor, I think that it's not
6 clear from the opinion for sure, but I do think the essence of
7 the opinion by the Federal Circuit on the fair-use question is
8 the Court didn't think there was a sufficient record, and
9 remanded back to this Court for further consideration.

10 And -- and certainly the question of Apache Harmony and
11 the fact that there are a number of commercial applications of
12 use of the free Java APIs made available through OpenJDK is
13 part of the evidence for fair use. And it certainly isn't
14 limited merely to the subject of transformation.

15 And so here we have a piece of evidence -- one of really
16 many, because, as the Court may remember, the parties submitted
17 findings of fact associated with these equitable defenses
18 around the time of the last trial.

19 **THE COURT:** Wait a second. I have a --

20 All right. Finish your point. I'll come back to it.

21 **MS. ANDERSON:** I guess the point here is that trying
22 to come back to where we were on the question of whether or not
23 this was somehow -- burdened the trial in some way -- these
24 factors overlap very, very significantly with issues that
25 relate to estoppel, with issues that relate to laches. And

1 there's nothing inefficient about the Court hearing live
2 testimony about them to make its decision. And the Court may
3 never have to decide equitable defenses, at all, if the jury
4 finds fair use.

5 **THE COURT:** Why, Ms. Hurst -- why shouldn't we
6 proceed by motion *in limine*, as opposed to summary judgment? I
7 don't want to decide these equitable defenses on summary
8 judgment, and where -- that would be a whole new round of --

9 No. We're not going to do that. I'm just going to tell
10 you now we're not going to have summary-judgment motions. And
11 we're going to have a limited number of pretrial motions *in*
12 *limine*, like six. And then you could bring up, on the day of
13 trial -- you could bring at 7:30 in the morning. We'll fight
14 it out in 15 minutes, whether or not there's some issue that's
15 got to be -- that's going to come up on that day, but that will
16 be -- so you will have many motions *in limine* as the trial goes
17 on.

18 But in real trials the lawyers don't need to know
19 everything, and, in fact, have no right to know everything,
20 prior to the opening statements. They don't have a right to
21 know what every evidentiary ruling is going to be as the trial
22 unfolds. They want to know, but they don't have a right to
23 know.

24 And there's no practical way to run a trial if the Judge
25 is bombarded with dozens of motions *in limine*. So I'm going to

1 say six. You each get six motions *in limine*; not long ones.
2 Don't give me 30 pages on each one. Five pages would be about
3 the normal length for the brief, and maybe a few pages for the
4 supplemental stuff.

5 But I think we don't need more summary-judgment motions.
6 It's just going to be a waste of time. I know enough about the
7 case to know I think it would be highly unlikely that I would
8 grant any of this. And if this turns out to be two weeks,
9 well, then maybe I'll give you two and a half weeks. I don't
10 know. We'll see, but if that's the problem, I --

11 But it does seem to me, looking through this fair-use
12 discussion, that this -- that at least the blog is going to
13 come into evidence on fair use, and maybe Apache. I don't know
14 enough about Apache to tell you right now.

15 I've come back to something. You -- are you trying to --
16 this JDK thing -- is that something that came into existence
17 after the first trial?

18 **MS. ANDERSON:** OpenJDK has been available since 2007,
19 I believe, Your Honor.

20 **THE COURT:** But I saw some announcement that you had
21 a backup. Backup. You could go to another -- you had a
22 different Android system in the wings, waiting to go. Or what
23 did I read? Something like that.

24 **MS. ANDERSON:** Yes. Well, there are newer versions
25 of Android that have been released and were published and made

1 available to Oracle during this regular fact discovery. And
2 those versions do incorporate code that uses OpenJDK.

3 **THE COURT:** Well, maybe you don't get to use that at
4 trial, because that's after the fact.

5 **MS. ANDERSON:** Well, Your Honor, actually it is
6 relevant to what's happening here.

7 **THE COURT:** It could be relevant. It could be
8 relevant.

9 **MS. ANDERSON:** Well --

10 **THE COURT:** But if you are trying to cut them off on
11 the 7.0, now you're trying to have it both ways. You want to
12 work in your new stuff, but you don't want them to work in
13 their new stuff.

14 **MS. ANDERSON:** Your Honor, actually we did discuss
15 this at length with Oracle's counsel. And we let Oracle know
16 that to the extent they intended to accuse the newer versions
17 of Android of infringement, then we would have to seek
18 permission to amend our Answer to assert an affirmative-license
19 defense. The parties basically agreed they would not accuse
20 those versions of infringement in this case, and we would
21 therefore not need to assert the affirmative license.

22 But we did make quite clear that, depending on the kinds
23 of arguments that are raised -- that appear to be being raised
24 by Oracle in this case, that the fact that Google is perfectly
25 able to create what is essentially, in Oracle's eyes, a

1 noninfringing alternative is certainly relevant to a host of
2 questions in this case, including but not limited to damages.
3 That is often the case, that a noninfringing alternative may
4 become relevant.

5 **THE COURT:** It may also be very relevant to whether
6 an injunction would be issued, since it's so easy to do it.
7 Maybe we just enjoin it as soon as the verdict comes out. If
8 you lose, then there may be an injunction immediately, because
9 of this very set of circumstances.

10 **MS. ANDERSON:** Well, I'm sure if it is something that
11 Oracle raises, Your Honor will resolve that, certainly.

12 But the point is that because of the nature of the
13 arguments that have been raised in the case, the fact that
14 Sun/Oracle made available in 2007 OpenJDK -- and that came in
15 evidence in the first trial, and it's been available in part of
16 this --

17 **THE COURT:** Wait a minute. That was in the first
18 trial?

19 **MS. ANDERSON:** Yes, absolutely.

20 **THE COURT:** I asked you. You said it was new.

21 **MS. ANDERSON:** No, no, no. There are two things,
22 Your Honor. Let me just clear this up.

23 Back in 2007, I believe just within just two months of
24 Google's release of the first Android version, Sun/Oracle
25 released, for free, OpenJDK platform, which includes the method

1 headers at issue in this case. And so, for free, back in 2007
2 and going forward, folks have been able to utilize that subject
3 to the GPL Version 2 license. And that fact and that
4 discussion is something that's been -- that was talked about in
5 the first trial, and the parties have known about all along.

6 The other thing that I was referring to is the fact that
7 for Android, recently -- I think it was Christmas Eve,
8 perhaps -- Google released newer versions of Android that
9 incorporate code licensed through OpenJDK.

10 **THE COURT:** All right.

11 **MS. ANDERSON:** And that's different. So --

12 **THE COURT:** See, all right. I'm not saying "Yes,"
13 and I'm not saying "No."

14 **MS. ANDERSON:** Of course.

15 **THE COURT:** But I am troubled that you would try to
16 keep out the new 7.0, but allow you yourself to use the Google
17 announcement on Christmas Eve.

18 **MS. ANDERSON:** Your Honor.

19 **THE COURT:** So I'm not saying you can't do that yet.
20 It may be that it's distinguishable, but there's a problem
21 there. Remind me what JDK is, versus the other regular Java.

22 **MS. ANDERSON:** Well, there are a few different
23 Java-related platforms made available by Sun/Oracle. And some
24 of them, such as the copyrighted works that were at issue in
25 the first trial, Oracle would say are platforms that they make

1 available subject to paid licenses for certain kinds of uses.

2 But then there's another Java platform called "OpenJDK"
3 that Sun/Oracle open sourced in 2007, which we made available
4 for free to the public for use, subject to the GPL Version 2
5 license for open sourcing, which is something that Your Honor
6 heard about early on in the last round, but probably is -- the
7 Court might need refreshers on that point.

8 But there are multiple Java platforms that have been made
9 available from time to time, and "OpenJDK" is the name of the
10 free one that's been around since '07, and that
11 Jonathan Schwartz talked about and testified about as -- as a
12 strategy that Sun was employing to make its stuff available for
13 free to encourage the use of Java in the world, which is why
14 Sun/Oracle is so thrilled that Android got released, because it
15 was yet another way to get the world to embrace Java, because
16 at the time Java was significantly on the decline.

17 And so that is why it was at issue and mentioned in the
18 first round. That's why it's still around and at issue here.
19 And, as always in any case, design-around,
20 noninfringing-alternative discussions are always kind of raised
21 when you have this kind of case involving accusations against
22 technology.

23 **THE COURT:** All right. Let's go back a moment to the
24 first question. What I would prefer would be -- I could do an
25 Order; and if that's what you want, I will. But I would prefer

1 that you two meet and confer, and send up to me an order by
2 tomorrow that would take the spirit of what I said -- and maybe
3 even not necessarily exact words, but the substance of what I
4 said. And -- but you might find ways that you could both agree
5 that it needs to be clarified.

6 But to say it again, I think what you're -- I would pick
7 up with this trial where we left off and where the
8 Federal Circuit said we should have gone on the record that
9 then existed, supplemented as you two have already stipulated
10 to, because you've stipulated to some ways to supplement the
11 record, and allow these Gingerbread Plus products to be a basis
12 for damages on the stipulation that they use all 37 APIs, but
13 leaving Google exposed to a new lawsuit on 7.0 and maybe 6.0.

14 Now, that's what I think I ruled, but you two may find
15 ways to improve upon the way I just said it. And I would be
16 pleased to let you try to together to come up with a form of
17 order.

18 **MS. ANDERSON:** Thank you, Your Honor.

19 **THE COURT:** Could you do that?

20 **MS. ANDERSON:** I believe we can work hard to get that
21 done, Your Honor.

22 **THE COURT:** All right. I want to tell you where we
23 are on the trial date. I still have a criminal case. I tried
24 to get them to move it up to the end of February, but they
25 refused. And I -- so I still have that criminal case on your

1 date. And I have to give priority to a criminal case. And I
2 can't -- I thought about it asking you to move yours up to the
3 end of February, but I know what your answer would be. There's
4 no way I could get you to do that, so I didn't ask you to do
5 that.

6 My guess is that the criminal case will plead out, but
7 that's only a guess, and I might be wrong.

8 So I just give you that heads-up, for what it's worth.

9 **MS. HURST:** Thank you, Your Honor.

10 Your Honor, in order to avoid disputes among the parties
11 in the resolution of the proposed form of order, I just want to
12 make sure that the Court's order is that Gingerbread through
13 Marshmallow can be included for remaining issues in the case,
14 other than infringement. In other words, we're not going to
15 bring a new infringement claim on 6 and 7; but to the extent
16 that those are relevant to fair use, not just damages, they
17 would be considered for fair use, as well.

18 **THE COURT:** I assume so. Right?

19 **MS. ANDERSON:** I assume if they're in -- I would
20 assume to the extent it's relevant, then --

21 **THE COURT:** So, well, there may be something --

22 Yes, I would say fair use, equitable defenses, anything
23 that would be relevant to litigating those. In other words, I
24 think what Google is stipulating to say is that all of those
25 versions of Android will have been deemed to be infringing of

1 1.5 [sic] and -- sorry -- 1.4 and 5.0. Right?

2 **MS. ANDERSON:** With one clarification, Your Honor.
3 And I think that -- I think we all understand this, but because
4 the fair-use and other defenses are still in play, if we are
5 found, for example, to have made a fair use, we would not be
6 infringers. So --

7 **THE COURT:** That's right. So it's infringement
8 subject to fair use.

9 **MS. ANDERSON:** Right, or use of -- or use of the
10 method headers. I mean, whatever language reflects the fact
11 that we have preserved our defenses, but -- but we're not
12 relitigating whether we're using those particular method
13 headers at issue and SSO at issue that were already litigated
14 the first time.

15 **THE COURT:** Well, if the jury rules against Google
16 with all that information about Gingerbread and so forth in
17 there, I don't think you could come back and then say --

18 **MS. ANDERSON:** Absolutely.

19 **THE COURT:** -- then say, *Oh, wait a minute, Judge.*
20 *There's never been any finding that they infringe.*

21 I would -- I might -- for injunction purposes, for
22 example, I might feel obligated to enjoin all of those
23 products.

24 **MS. ANDERSON:** (Nods.)

25 **THE COURT:** All right. When is our next hearing

1 date? Just so I'll -- I could --

2 **MS. HURST:** I think the pretrial conference is next;
3 isn't it? On April 27th, Your Honor.

4 **THE CLERK:** 8:00 a.m. on April 27th.

5 **THE COURT:** I am thinking about -- but I may not do
6 it, but I'm thinking about a one-and-a-half-hour tutorial for
7 me to get me back up to speed on the technology. And so I may
8 send out -- and this doesn't have to be fancy. I don't need
9 experts. The lawyers can do it. But cartoons, you know, like
10 you see in the funny papers -- cartoons are very instructive
11 for me. So I learn. Cartoons are good. Diagrams are good.

12 **MS. HURST:** Your Honor, if I may, there was one other
13 issue about the scope of relief. In its motion to strike,
14 Google sought to strike any reference at all to Java 6 and 7;
15 but there were compatibility tests and other matters that were
16 addressed in the expert reports that had only to do with fair
17 use, and not related to infringement. And the compatibility
18 testing in particular, Your Honor, had to take place in a Java
19 6 and 7 environment, because that's the instructions that
20 Google gives for building the Android platform. That was the
21 only way we could do the testing.

22 So, Your Honor, what we wanted to just make sure is that
23 the scope of the Order does --

24 **THE COURT:** You're not trying to knock that out; are
25 you?

1 **MR. PAIGE:** We are, Your Honor, because there's no
2 relevance of 6 and 7 to the case if they're not being used for
3 purposes of infringement.

4 Now, they could have run the Java SE 5 test on other
5 versions of Android if they wanted to. I'm not sure what the
6 relevance of this compatibility testing is, but it's going to
7 be very confusing to the jury to hear about compatibility
8 testing with versions of Java that aren't, in fact, in the
9 case.

10 **THE COURT:** Why is it, again, that you have to bring
11 up the 6 and 7? I didn't quite get it.

12 **MS. HURST:** Your Honor, the instructions for
13 compiling Android in those versions rely on Java 6 and 7. So
14 in order to compile them and run the compatibility test, our
15 expert just made clear that it had done that properly by
16 following Google's instructions, which refer to 6 and 7.

17 **THE COURT:** These are instructions in what, though?

18 **MS. HURST:** On Google's websites about how to
19 download their code and compile it into a usable version.

20 **THE COURT:** What's wrong with that?

21 **MR. PAIGE:** I don't know why they couldn't have run
22 it against 5 compatibility test.

23 **THE COURT:** Well, but your own instructions say you
24 run it against 6 or 7. Right?

25 **MS. HURST:** Yes. You can't compile it with 5. It

1 only compiles --

2 **THE COURT:** You said, Ms. Hurst, that the Google
3 instructions called out 6 and 7 specifically.

4 **MS. HURST:** To build the Android platform. Yes,
5 Your Honor.

6 **MR. PAIGE:** Which is different than the compatibility
7 test, Your Honor. Google didn't say anything about Oracle's
8 compatibility test. It says here's how you can build the
9 Android version. At that point, Oracle can run whatever
10 compatibility test it wants. It can run its 5 test. It can
11 run its 6 test. It can run its 7 test.

12 **THE COURT:** I don't know. This is possibly -- I'm
13 not going to say "Yes" or "No" on this, but I am -- I'll just
14 say generally I am not ruling 6 and 7 categorically out. I
15 think that would be -- there could be ways in which it should
16 come into evidence for limited purposes, but I'm not ruling it
17 in on any limited purposes.

18 But I don't want Google to go away doing the old trick of,
19 *Ah, the Judge has ruled in our favor on this point, and*
20 *therefore he must rule on every little thing in our brief.* No,
21 I'm not doing that. I don't know. I haven't read all of your
22 brief. Actually, I did read all of your brief, but I can't say
23 I remember it. And just -- I agree with the thrust of your
24 point, and I'm not agreeing with every little nuance.

25 **MR. PAIGE:** (Nods.)

1 **THE COURT:** So I'm not going to rule on that. I'm
2 just saying that I'm not categorically ruling 6 and 7 out for
3 all purposes.

4 **MR. PAIGE:** Thank you, Your Honor.

5 **THE COURT:** So try to give me that draft order by
6 noon tomorrow. Can you do that, or do you need more time?

7 **MS. ANDERSON:** I think it would be great, Your Honor,
8 if we had close of business, just to give us a little more
9 time.

10 **THE COURT:** Does that mean 5:00 o'clock, or does that
11 mean midnight? 5:00 o'clock is okay.

12 **MS. ANDERSON:** Thank you.

13 **MS. HURST:** Thank you, Your Honor.

14 **MR. PAIGE:** Thank you, Your Honor.

15 **THE COURT:** All right.

16 (At 11:59 a.m. the proceedings were adjourned.)

17 I certify that the foregoing is a correct transcript from the
18 record of proceedings in the above-entitled matter.

19

20 

21 _____ February 2, 2016

22 Signature of Court Reporter/Transcriber Date

23 Lydia Zinn

24

25